No. 06-837

In the Supreme Court of the United States

OLD STONE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioner was not entitled to restitution as a remedy for the government's breach of its contracts with petitioner because petitioner continued to perform after the breach, the government detrimentally relied on that continued performance, and petitioner continued, after the breach, to accept performance from the government.

2. Whether the court of appeals correctly held that petitioner was also not entitled to restitution because it had been awarded damages for the breach, and a restitution award would therefore constitute a windfall.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 450 F.3d 1360. The opinion of the Court of Federal Claims on liability (Pet. App. 99a-106a) is unreported. The opinion of the Court of Federal Claims on damages (Pet. App. 29a-98a) is reported at 63 Fed. Cl. 65.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 2006. A petition for rehearing was denied on September 21, 2006 (Pet. App. 107a-108a). The petition for a writ of certiorari was filed on December 14, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This is one of the breach-of-contract cases that were filed after the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183. See *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996). Of the approximately 122 *Winstar*-related cases that were originally filed, only approximately two dozen remain pending, and most of those cases, like this one, have nearly completed the litigation process.

1. Petitioner was a bank holding company, located in Rhode Island, that owned a commercial bank, (Old) Old Stone Bank (OOSB). The instant dispute arises from petitioner's acquisition of two thrifts, which it merged with OOSB to form a new thrift, (New) Old Stone Bank (OSB). Pet. App. 2a-4a.

In June 1984, petitioner submitted a proposal to the Federal Savings and Loan Insurance Corporation (FSLIC) to acquire a small thrift, Rhode Island Federal (RIF). Petitioner wanted to acquire RIF in order to obtain a federal savings bank charter, which would permit it to engage in commercial lending and, at the same time, to expand into new geographical areas. Operating all of its banking activities under a savings bank charter would also enable petitioner to reduce its regulatory agencies from three (the Federal Reserve, the Federal Deposit Insurance Corporation (FDIC), and the State) to one (the Federal Home Loan Bank Board (FHLBB)). Pet. App. 2a, 33a-34a.

FSLIC accepted petitioner's offer and, in August 1984, approved the transaction. RIF converted from a mutual savings institution to a federal stock savings bank, OSB. Petitioner then transferred all of its stock

in OOSB to OSB and acquired all of OSB's stock for a nominal amount ($100). As a result, petitioner became a thrift holding company owning all of the shares of OSB, a federally chartered thrift, the deposits of which were federally insured. Pet. App. 2a, 19a & n.12, 38a.

As part of the RIF transaction, petitioner, OSB, and FSLIC executed a series of documents, including an Assistance Agreement, under which FSLIC contributed $9.55 million to OSB, which OSB was permitted to count as a "capital credit" and to include, along with the $4.4 million in supervisory goodwill arising from the merger, in calculating its regulatory capital. Also as part of the transaction, petitioner executed a Net Worth Maintenance Stipulation (NWMS) that required it to contribute additional funds to OSB as necessary to maintain regulatory capital compliance. Pet. App. 2a-3a.

In 1985, petitioner submitted to FSLIC a proposal to acquire a second thrift, Citizens Federal (Citizens), a FSLIC-insured, federally-chartered mutual association, located in Seattle, Washington. The proposal was accepted, and, in December 1985, petitioner acquired Citizens. Petitioner contributed $14.8 million to Citizens, which was converted to a federal stock savings bank and renamed Old Stone Bank of Washington (OSBW). FSLIC contributed approximately $78.5 million in direct cash assistance, which was permitted to be counted as a credit to OSBW's capital. The transaction also generated $2.76 million in supervisory goodwill, which OSBW was also permitted to count as capital. The various arrangements were memorialized in an Assistance Agreement. OSBW was operated as a separate subsidiary of petitioner until December 1986, when it was merged with and into OSB. Pet. App. 3a-4a.

2. In August 1989, Congress enacted FIRREA to address widespread problems in the savings and loan industry. As part of FIRREA, Congress created the Office of Thrift Supervision (OTS) and charged it with responsibility for examining, supervising, and regulating federally insured thrifts. 12 U.S.C. 1462a, 1463. FIRREA gave the Director of OTS the authority to appoint a conservator or receiver for any insured savings association if the Director determined, in the exercise of his discretion, that one or more bases for the seizure of the thrift existed. 12 U.S.C. 1464(d)(2)(A), 1821(c)(5). FIRREA also imposed new capital requirements on thrifts and restricted their ability to count capital credits and supervisory goodwill toward those capital requirements. Enactment of FIRREA thus constituted a breach of the government's promises that the capital credits and supervisory goodwill generated by petitioner's acquisitions of RIF and Citizens would count towards OSB's regulatory capital. Pet. App. 4a, 7a.

After the breach, OSB satisfied two of FIRREA's new capital requirements but failed the risk-based capital requirement by approximately $36 million. Although OSB was therefore undercapitalized and subject to seizure, neither petitioner nor OSB repudiated their contracts with the government or filed suit for breach of contract. Instead, OSB attempted to come into capital compliance. OSB began by selling two subsidiaries. It later submitted a capital plan that required it to attain capital compliance through the sale of additional assets and capital infusions by petitioner under the NWMS, in accordance with a revised schedule. The government approved the capital plan and permitted petitioner to continue to operate OSB, with its federal savings bank

charter and federal deposit insurance, while it sought to rebuild its capital. Pet. App. 5a-6a, 19a.

In May 1990, OSB sold the former branches of OSBW for a gain of $9.2 million. In addition, between 1990 and 1992, petitioner made three contributions of capital to OSB totaling $74.5 million. Those contributions exceeded the amount of unamortized goodwill and capital credits that OSB, absent the breach, could have included as regulatory capital in 1993, when it was later seized. Pet. App. 6a.

OSB, however, was also experiencing significant problems as a result of economic conditions and other factors unrelated to the loss of regulatory capital caused by the breach. Ultimately, on January 29, 1993, the OTS seized OSB and placed it into receivership because it was "critically undercapitalized." Pet. App. 6a-7a.

3. Meanwhile, in September 1992—more than three years after the enactment of FIRREA, petitioner filed suit in the Court of Federal Claims. Petitioner alleged that, by enacting FIRREA, the government had breached its contracts promising petitioner that the government would permit OSB to count as regulatory capital the goodwill and capital credits created by the acquisitions of RIF and Citizens. Pet. App. 7a.

The trial court granted petitioner's motion for summary judgment on contract liability. Pet. App. 99a-106a. The court then held a trial on damages, during which petitioner alternatively pursued theories of restitution, reliance, and mitigation. The court entered judgment for petitioner and awarded damages totaling $192.5 million. *Id.* at 29a-98a. The court awarded (1) $103.2 million representing the value of petitioner's stock in OOSB, the commercial bank that petitioner merged with RIF; (2) $14.8 million representing petitioner's contribu-

tion to Citizens; and (3) $74.5 million representing post-breach capital contributions made by petitioner to replace the regulatory capital lost as a result of the breach. *Id.* at 97a-98a. The government appealed the damages award.

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-28a. The court affirmed the award of the $74.5 million in capital contributions that petitioner had made after the breach in order to replace the regulatory capital eliminated by FIRREA. *Id.* at 9a-14a. The court observed that a non-breaching party may generally recover as damages the costs it "incurred in a reasonable effort to avoid loss caused by a breach." *Id.* at 9a. And the court noted that it had previously approved damages awards based on the "costs of generating replacement capital resulting from the elimination of regulatory capital by FIRREA." *Id.* at 10a.

The court of appeals reversed the award of the $118 million that petitioner contributed towards the initial acquisitions ($103.2 million to acquire RIF and $14.8 million to acquire Citizens). Pet. App. 14a-27a. The court first held that those contributions were not recoverable under a restitution theory. *Id.* at 14a-21a. The court explained that restitution is available only for a total breach, and when a non-breaching party elects to continue performance after a breach and to treat the breach as partial rather than total, restitution is not available. *Id.* at 15a-16a. Reviewing the legal authorities, the court concluded that they differed on what conduct is required to establish an election. One view appeared to be that mere continued performance can result in an election, but the stricter view was that there must also be detrimental reliance by the breaching party on the continued performance or acceptance by

the non-breaching party of continued benefits under the contract. *Id.* at 17a. The court stated that this Court had addressed similar circumstances in *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United States* (*Mobil Oil*), 530 U.S. 604 (2000), but had not made a clear choice between those two views. Pet. App. 17a-18a.

The court of appeals concluded that it "need not decide which standard governs, because even the stricter election rule is satisfied" in this case. Pet. App. 18a. The court explained that petitioner had continued performance "by deciding not to terminate the contracts or to file suit for restitution after the enactment of FIRREA" but instead "to comply with the [NWMS] of the original contracts and to make payments to the thrift to bring it into compliance with the requirements of FIRREA." *Ibid.* The court further stated that the "government detrimentally relied on [petitioner]'s conduct" by allowing petitioner to make the capital contributions for which the government had now been held liable in damages and by deferring seizure of OSB "with the likely result" that the insurance fund suffered "additional losses." *Id.* at 19a. And, the court concluded, "[t]here were also continued benefits to [petitioner] received under the earlier agreements with the government," including the ability to continue to operate the thrift and to receive federal deposit insurance and the government's deferral of seizure of the thrift despite its non-compliance with FIRREA capital standards. *Ibid.*

The court of appeals also held that the initial contributions could not be recovered under a reliance theory because, as a matter of law, it was not foreseeable that the breach would cause the loss of the contributions. Pet. App. 21a-27a. The court found that petitioner had "completely failed" to establish that the "extended chain

of causation" under its theory—including that petitioner would suffer substantial financial difficulties independent of the breach—was foreseeable at the time of contract formation. *Id.* at 24a-25a. Petitioner does not challenge that holding in this Court.

Finally, the court of appeals noted that petitioner's claim for the initial contributions was barred for the additional reason that "[r]estitution or reliance damages are inappropriate where relief would result in an 'unfair windfall' to the non-breaching party." Pet. App. 27a. In this case, the court concluded, "the $74.5 million" awarded as damages had "replaced the capital that the breach eliminated, and the award of the additional amounts as restitution or reliance would be duplicative." *Ibid.*

ARGUMENT

The court of appeals correctly rejected petitioner's claim for restitution on two independent grounds. That decision does not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. Petitioner contends that the court of appeals erred by purportedly holding that petitioner elected to forgo restitution "even though [it] did not receive, and could not expect to receive, any post-breach contract performance from the breaching party." Pet. 12 (emphasis omitted). Based on that characterization of the court of appeals' holding, petitioner contends (Pet. 13-22) that the court's decision conflicts with this Court's decision in *Mobil Oil*, prior decisions by the Federal Circuit, and decisions of other courts of appeals. The court of appeals did not, however, make the holding that petitioner attributes to it. This case therefore does not

present the legal issue raised by petitioner. And there is no conflict between the court of appeals' decision and *Mobil Oil* or the decision of any court of appeals. Moreover, this case would not in any event be an appropriate vehicle to address the legal issue raised by petitioner, because petitioner would not prevail even under the legal rule that it advocates.

a. Although petitioner contends that the election of remedies doctrine applied by the court of appeals is "novel" and "insupportable" (Pet. 1), that doctrine is well-established. It has long been recognized that, when there has been a material breach of a contract, the nonbreaching party must elect between (1) ending the contract and seeking restitution or damages for total breach or (2) continuing the contract, treating the breach as partial, and forgoing its right to restitution. 13 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 39:32, at 645 (4th ed. 2000); Joseph M. Perillo, *Calamari and Perillo on Contracts* §§ 11.32-11.33, at 462-466 (5th ed. 2003); Restatement (Second) of Contracts § 373 cmt. a (1981) (Restatement); *e.g.*, *Barron Bancshares, Inc.* v. *United States*, 366 F.3d 1360, 1383 (Fed. Cir. 2004); *Cities Serv. Helex, Inc.* v. *United States*, 543 F.2d 1306, 1313-1315 (Ct. Cl. 1976).

As the court of appeals explained, there is some disagreement about the conduct necessary to constitute an election. Pet. App. 17a; see *Cities Serv. Helex*, 543 F.2d at 1313-1314 (discussing competing views). The court of appeals concluded, however, that, it "need not decide which standard governs, because even the stricter election rule is satisfied" in this case. Pet. App. 18a. In particular, the court of appeals determined, petitioner continued to perform under its contracts with the government, the government detrimentally relied on peti-

tioner's conduct, and petitioner continued to accept performance from the government under the contracts. *Id.* at 18a-19a.

Petitioner is therefore incorrect in asserting (*e.g.*, Pet. 1, 10-11, 12) that the court of appeals held that petitioner elected to forgo restitution even though it "did not accept and could not expect any post-breach contract performance." Pet. 1. On the contrary, the court of appeals expressly held that petitioner *had* accepted "continued benefits * * * under the earlier agreements with the government." Pet. App. 19a.[1]

Although petitioner takes issue (Pet. 12-13) with that conclusion, that fact-bound disagreement does not warrant this Court's review. Moreover, the court of appeals' conclusion that petitioner continued to receive performance under the contracts was correct. As the court of appeals recognized, in exchange for contributing the funds necessary to acquire RIF and Citizens, petitioner did not merely seek and obtain the opportunity to count supervisory goodwill and capital credits toward OSB's regulatory capital requirements. Petitioner also sought and obtained a federal savings bank charter, which in-

[1] Although the court of appeals used the words "benefit" and "benefits" (Pet. App. 17a-19a) rather than "continued performance," it is clear that the court was referring to continued performance. In discussing the benefits received by petitioner, the court expressly noted that they were "under the earlier agreements with the government." *Id.* at 19a. And, in explaining that the "stricter" view on election requires a "benefit" to the non-breaching party, the court of appeals cited the section of *Mobil Oil* in which this Court inquired whether the non-breaching party had received continued performance under the contract. *Id.* at 17a (citing *Mobil Oil*, 530 U.S. at 621-623). Moreover, in discussing *Mobil Oil*, the court of appeals used interchangeably the phrases "the receipt of partial performance" and "the receipt of benefits." See *id.* at 17a-18a.

creased its ability to engage in commercial lending and enabled it to expand its deposit base outside Rhode Island. Pet. App. 2a, 33a-34a. Moreover, included as part of the government's approval of petitioner's request to acquire RIF was an agreement by FSLIC to provide federal deposit insurance for OSB's deposit accounts. *Id.* at 19a & n.12. After the breach, the government permitted petitioner to continue to operate OSB under its federal savings bank charter, the government deferred seizure of the thrift, and the government continued to provide federal deposit insurance to OSB. *Ibid.*

Petitioner also contests (Pet. 18-19) the court of appeals' conclusion that the government detrimentally relied on petitioner's manifestation of its election to continue the contracts. That disagreement too is fact-bound and unworthy of this Court's review. In any event, the court of appeals correctly determined that there was detrimental reliance by the government. As the court of appeals explained, the government approved the thrift's new capital plan, which enabled petitioner to continue to operate the thrift for a period of three years. In doing so, however, the government, in order to improve the chances that the thrift would succeed, requested petitioner to make $74.5 million in additional contractual contributions under the NWMS, for which the Government ultimately became liable in damages. Pet. App. 19a.

In addition, as the court of appeals also noted, the government's acceptance of petitioner's continued performance likely caused losses to the insurance fund that would have been avoided if, instead of permitting OSB to continue in operation, the government had seized OSB immediately upon enactment of FIRREA. Pet. App. 19a. Petitioner is thus incorrect in asserting that

the court of appeals' "sole ground" for finding detrimental reliance was that OSB's deficiency in risk-based capital increased between the 1989 breach and the 1993 seizure. Pet. 18. The court made that observation in a footnote to support the second of the two, independent bases on which it found detrimental reliance. See Pet. App. 19a n.11. Moreover, contrary to petitioner's contentions (Pet. 18-19), the increased deficiency in risked-based capital, along with other record evidence, amply supported the court of appeals' conclusion that the delay in seizing OSB likely resulted in further deterioration of its net worth and thus increased the costs to the government upon seizure. See, *e.g.*, C.A. App. A101364-A101366 (testimony that OSB was in a "death spiral" of mounting losses and deteriorating capital); *id.* at A102931, A102933, A300861, A300988, A301026 (evidence that, between 1990 and 1992, OSB suffered losses of $226 million).

b. Based on its inaccurate description of the court of appeals' decision, petitioner contends (Pet. 13-15) that the decision is "directly contrary to this Court's decision in *Mobil Oil*." Pet. 13. In particular, petitioner asserts that *Mobil Oil* "made clear that there can be no election forfeiting the right to restitution where" the non-breaching party "does not receive further *performance of the breached contract* from the breaching party" (Pet. 13), and the decision here "cannot be squared with *Mobil Oil*" because "there was no actual or even expected post-breach performance of the breached contracts by the Government" (Pet. 15).

Petitioner is doubly mistaken. First, even assuming that *Mobil Oil* stood for the proposition that petitioner asserts, it would not conflict with the court of appeals' decision because, as described above, the court of ap-

peals expressly concluded that petitioner *had* received post-breach performance by the government. See Pet. App. 19a. Second, *Mobil Oil* does not stand for the proposition advanced by petitioner.

In *Mobil Oil*, the Court considered the doctrine of waiver, which is closely related to the doctrine of election. The Court first observed that a party could not waive its right to restitution "simply by urging performance." 530 U.S. at 621-622 (citing Restatement § 257). The Court then stated that the government had not shown that "the companies' continued actions under the contracts amount to anything more than this urging of performance." *Id.* at 622. Because the companies had not themselves continued performance under the contracts, the Court concluded that the government's claim of waiver must turn on the contention that the companies had accepted performance from the government. *Ibid.* The Court then examined whether the companies had in fact received such performance and concluded that they had not. *Id.* at 622-623.

Thus, contrary to petitioner's contention, *Mobil Oil* does not establish that the non-breaching party can *never* forfeit its right to restitution unless it receives continued performance. Instead, *Mobil Oil* establishes only that when the non-breaching party has not itself continued to perform, but has merely urged the breaching party to perform, the non-breaching party does not waive its right to restitution unless it accepts continued performance from the breaching party. The decision in this case is fully consistent with that principle. Petitioner did far more than merely urge the government to perform. As the court of appeals explained, petitioner "continued to treat the assistance agreements as in place" by submitting and receiving approval of a new

capital plan to enable OSB to continue to operate and, at the same time, "comply[ing] with the [NWMS] of the original contracts" by making capital contributions to the thrift. Pet. App. 18a.

c. Petitioner also contends (Pet. 21-22) that this Court's review is warranted because the court of appeals' decision is inconsistent with its prior decisions. An intra-circuit conflict would not be a reason for this Court to grant a writ of certiorari. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, there is no conflict.

Contrary to petitioner's contention, the decision below does not conflict with the decision in *First Nationwide Bank* v. *United States*, 431 F.3d 1342 (Fed. Cir. 2005). In *First Nationwide*, the government entered into a complex agreement that included a promise to reimburse the plaintiff for 90 percent of the losses that it incurred on certain assets that it acquired from a failing thrift. The reimbursement was reduced to 90 percent from 100 percent because the government also promised the thrift certain tax benefits. The government then breached the agreement by eliminating the tax benefits, and the thrift sued for the additional 10 percent reimbursement. *Id.* at 1344-1346. In awarding the request relief, the Court of Federal Claims referred to the remedy as "partial restitution." *Id.* at 1352. Focusing on that terminology, the government argued on appeal that restitution was not an appropriate remedy because there had been no "total breach." *Ibid.* The court of appeals rejected that argument. *Ibid.*

As the court of appeals explained in this case, the claim in *First Nationwide* was "not a true restitution claim." Pet. App. 20a n.13. The plaintiff was suing for "amounts that it was promised by the government, not

amounts that it actually expended under the contract." *Ibid.* Thus, *First Nationwide* did not address the question that the court of appeals decided here—when a plaintiff, by electing to continue a contract, forfeits its right to restitution of amounts expended in performance of the contract. Moreover, the plaintiff in *First Nationwide*, unlike petitioner, "promptly protested the [breach], filing suit first against the FDIC and then against the United States." *Ibid.* (quoting *First Nationwide*, 431 F.3d at 1352) (brackets in original).[2]

There is also no conflict between the decision in this case and *Landmark Land Co.* v. *FDIC*, 256 F.3d 1365 (Fed. Cir. 2001), or *Hometown Financial, Inc.* v. *United States*, 409 F.3d 1360 (Fed. Cir. 2005). Neither of those cases involved any question about the election of remedies. Indeed, *Hometown* did not involve any challenge at all to the appropriateness of the award of restitution.

d. Petitioner is also incorrect in contending (Pet. 22) that the court of appeals' decision in this case conflicts with decisions of other courts of appeals in *Far West Federal Bank, S.B.* v. *Office of Thrift Supervision-Director*, 119 F.3d 1358 (9th Cir. 1997), and *Resolution Trust Corp.* v. *FSLIC*, 25 F.3d 1493 (10th Cir. 1994).

In *Far West*, in the same month that the OTS stated that FIRREA abrogated any existing forbearance agreements concerning the treatment of goodwill, the plaintiffs filed suit seeking injunctive relief or, in the alternative, recission of their agreement and restitution

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[2] Petitioner points (Pet. 21-22) to certain language in *First Nationwide* that it contends is inconsistent with the decision here. Because this case involved more than mere continued performance by petitioner, there is no inconsistency. In any event, this Court "reviews judgments, not statements in opinions." *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956).

of any benefits conferred upon the Government. *Far West*, 119 F.3d at 1362. In *Resolution Trust*, within a month of being notified by the OTS that it would apply the new FIRREA regulations to the thrift, the plaintiffs notified the OTS that they were rescinding their agreement to acquire the thrift, tendered their stock in the thrift, and requested return of their capital contribution. When the OTS refused the plaintiffs' request, they filed suit seeking recission of their contract and restitution. *Resolution Trust*, 25 F.3d at 1498. Those actions are in sharp contrast to those of petitioner, which did not sue for three years while it continued to perform and to accept performance under its contracts with the government.[3]

e. Even if there were any basis to petitioner's claims of conflict, this case would be an inappropriate one in which to address the legal issue that petitioner presses. Petitioner would not be entitled to restitution even under its own theory. Petitioner itself acknowledges that a non-breaching party elects to forgo restitution if it continues to receive contract performance and there is detrimental reliance by the other party to the contract. See Pet. 15 (citing Restatement § 378). As described above, the court of appeals correctly determined that both those conditions were satisfied here. See pp. 10-12, *supra*; Pet. App. 19a. Because the legal issue raised by petitioner would make no difference to the outcome of

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[3] Moreover, in *Far West*, the court of appeals rejected the FDIC's argument that the doctrine of election of remedies barred the plaintiffs' claim for restitution because they never received the specific performance that they sought. *Far West*, 119 F.3d at 1365-1366. The court did not suggest that the plaintiffs' could have obtained restitution if they had obtained specific performance.

this case, the case is, at the very least, a poor vehicle to address the issue.

2. Petitioner also argues (Pet. 23-29) that the court of appeals erred in ruling that restitution was unavailable for the additional reason that it would give petitioner a windfall. Petitioner contends that the court of appeals' windfall holding conflicts with *Mobil Oil* and with various decisions of the Federal Circuit and other courts of appeals. Even if petitioner's contentions were correct, this case would not warrant review, because the court of appeals' holding on election of remedies is correct and independently supports the judgment. In any event, petitioner's contentions are not correct. The court of appeals correctly held that restitution was not appropriate here because petitioner had already received damages for the breach. And that holding does not conflict with *Mobil Oil* or any of the other decisions identified by petitioner.

a. The court of appeals correctly held that an award of restitution was inappropriate because it would have given petitioner an "unfair windfall." Pet. App. 27a. As the court of appeals explained, it had already upheld a damages award of $74.5 million. That award "replaced the capital that the breach eliminated, and the award of additional amounts as restitution or reliance damages would be duplicative." *Ibid.* The court's ruling is consistent with the well-established principle that damages and restitution are alternative remedies. See, *e.g.*, 12 Arthur L. Corbin, *Corbin on Contracts* § 1223, at 516 (1997) ("Whatever may be supposed to be the true nature of the two remedies, it is certain that damages and restitution are not both available as remedies for a single injury by breach of contract.").

The court's ruling is also sound policy. The award of the costs of replacing the regulatory capital lost by the breach placed petitioner in the same position it would have occupied had there been no breach. It would give petitioner a double recovery to also award restitution, which would have placed petitioner in the same position it would have occupied had there been no contract. It would be neither equitable nor logical simultaneously to restore petitioner to both the position it would have occupied had the contract been performed and the position it would have occupied had there been no contract at all.

This Court has previously denied review in a *Winstar*-related case in which the petitioner similarly asserted that the trial court incorrectly denied restitution on the ground that it would have bestowed a windfall. See *Southwest Inv. Co.* v. *United States*, 126 S. Ct. 2321 (2006). In this case, as in that one, the court of appeals' decision followed from the application of general and settled principles of the law of contracts to the particular facts of the case. And in this case, as in that one, further review is not warranted.

b. Petitioner contends (Pet. 23-25) that the court of appeals' windfall holding is inconsistent with this Court's statement in *Mobil Oil* that restitution is available regardless of whether the breached contract "would, or would not, ultimately have produced a financial gain." *Mobil Oil*, 530 U.S. at 623-624. That is incorrect. The court of appeals did not hold that restitution was unavailable because petitioner's contracts with the government would not have produced a financial gain. Instead, the court of appeals held that restitution was unavailable because petitioner had already received damages measured by the cost of replacing the capital lost as a result of the breach of the contracts. See Pet.

App. 27a. The Court in *Mobil Oil* had no occasion to decide whether or when restitution may be awarded in addition to an award of damages for the breach. See 530 U.S. at 623 (noting that the plaintiffs sought only restitution and not damages). The court of appeals' decision that petitioner could not receive both restitution and damages therefore does not conflict with *Mobil Oil*.[4]

c. Petitioner also incorrectly argues (Pet. 25-26) that the court of appeals' windfall ruling is contrary to its own previous decisions. As discussed above, a conflict within the Federal Circuit is appropriately resolved by that court rather than this one. In any event, there is no conflict.

Marathon Oil Co. v. *United States*, 236 F.3d 1313 (2000), was the Federal Circuit's decision on remand from *Mobil Oil*. In *Marathon Oil*, as in *Mobil Oil*, the plaintiffs were seeking only restitution and not damages. The court of appeals therefore had no occasion to and did not address the question whether restitution may be

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[4] An award of restitution was also inappropriate because in this case, unlike in *Mobil Oil*, there was substantial performance of the contract by the government. In addition to the post-breach performance already discussed, the government also provided substantial performance before the breach, by giving petitioner the financial assistance it was promised and allowing petitioner to operate the thrifts for over four years, during which time petitioner enjoyed the benefits of the federal savings bank charter and federal deposit insurance, as well as the opportunity to include both goodwill and capital credits in calculating regulatory capital. Because the court of appeals ruled for the government on its election of remedies and windfall arguments, the court found it unnecessary to address the government's argument that restitution was also unavailable because there was not a total breach. Pet. App. 27a. The absence of a total breach provides an alternative ground to support the court of appeals' judgment and another reason why a grant of certiorari is not warranted in this case.

awarded when a plaintiff is already receiving a damages award representing the cost of replacing the capital lost as a result of the breach.

For the same reason, the court of appeals' decision in this case does not conflict with its decision in *Acme Process Equipment Co.* v. *United States*, 347 F.2d 509 (Ct. Cl. 1965), rev'd on other grounds, 385 U.S. 138 (1966). That case addressed only whether restitution may be awarded as an alternative remedy for breach of contract, not whether restitution may be awarded in addition to damages for the breach.

There is also no conflict with *LaSalle Talman Bank, F.S.B.* v. *United States*, 317 F.3d 1363 (Fed. Cir. 2003), or *Glendale Federal Bank, FSB* v. *United States*, 239 F.3d 1374 (Fed. Cir. 2001). In both of those cases, the court of appeals held that restitution was not an appropriate remedy.

d. Petitioner further errs in contending (Pet. 26) that the court of appeals' windfall ruling conflicts with the Second Circuit's decision in *Bausch & Lomb Inc.* v. *Bressler*, 977 F.2d 720 (1992). The Second Circuit did not discuss whether or when restitution is available in addition to damages for the breach. Although the court stated that "restitution is available even if the plaintiff would have lost money on the contract if it had been fully performed," *id.* at 730, that statement does not conflict with decision in this case, which, as discussed above, did not present that question.

3. Finally, contrary to petitioner's contentions (Pet. 27-29), there is nothing inequitable or harmful to the public in the court of appeals' conclusion that petitioner was not entitled to both restitution of its original investments and the costs of continuing the breached con-

tracts by replacing the capital lost as a result of the breach.

When the government breached the contracts—assuming *arguendo* that the breach was total, but see note 4, *supra*—petitioner was entitled to declare the contracts at an end and to seek the return of its original investments. Contrary to petitioner's argument (Pet. 17-18), nothing compelled it to do otherwise. In *Globe Savings Bank, F.S.B.* v. *United States*, 65 Fed. Cl. 330 (2005), aff'd and vacated in part, and remanded, 189 Fed. Appx. 964 (Fed. Cir. 2006), for example, the investors decided to and did liquidate the thrift after the government breached the contract. *Id.* at 344-345.

Alternatively, petitioner was entitled to decide, as it did, to continue the contracts, to mitigate the breach by replacing the lost capital, and to seek compensation for the cost of the mitigation. In doing so, however, petitioner lost any right that it would otherwise have had to restitution of its original contributions.

Contrary to petitioner's argument, that result will not inappropriately discourage mitigation efforts by contractors when the government commits a breach. The non-breaching party who mitigates by continuing the contract is entitled to recover all reasonable costs of mitigation. At the same time, the non-breaching party is encouraged to continue a contract only if continuation makes economic sense because, by continuing the contract and seeking the costs of that effort at mitigation, the non-breaching party forgoes the right to recover restitution. The public benefits because the non-breaching party is more likely to make an economically rational decision about whether to continue the contract.

In contrast, under petitioner's proposal that the non-breaching party be able to recover both its original in-

vestment and its costs of continuing the contract, the non-breaching party would have an incentive to continue the contract even if it might not make economic sense. If continuing the contract ultimately proved to have been misguided, the non-breaching party would still be able to recover its original investment and many, if not all, of its mitigation costs in continuing the contract. There would be little or no disincentive to continue a contract that should not be continued. Moreover, the non-breaching party would have little of its own at risk in continuing the contract and would therefore be encouraged to assume larger risks in performing under the continued contract. Thus, as the court of appeals correctly held, there would be a moral hazard to the insurance fund under petitioner's proposed result. Pet. App. 19a-20a. Even if that moral hazard could be limited by the rule that only reasonable mitigation costs may be recovered (see Pet. 17), it would not be eliminated.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2007